RECOVERY ON ACCIDENT POLICIES LIMITING LIABILITY TO INJURIES OR DEATH EFFECTED "THROUGH EXTERNAL, VIOLENT AND ACCIDENTAL MEANS."

ACCIDENT insurance policies and constitutions of fraternal orders frequently contain clauses providing in substance that the company or order shall only be liable for bodily injury or death "effected through external, violent and accidental means alone and independent of all other causes." Many interesting and important questions have arisen, and are still arising, out of this language.

1. One such question is whether, where an accident is sustained which, either *ipso facto* or else because of the pre-disposition or temperamental weakness of the insured, brings on disease and death, there may be a recovery. To illustrate, the insured sustains an accidental abrasion and blood poison or erysipelas sets in; may there be a recovery under the above language? The authorities are almost, if not quite, unanimous in such case in sustaining a recovery, or to speak more accurately, in holding that it is for the jury to say whether such a case comes within the language of the policy.[1] When the insured has prior to the accident suffered with the same disease which follows it, and the accident merely aggravates such old disease, or brings it out anew, the authorities are apparently not in accord. The Massachusetts court in Freeman *v.* Mercantile, etc., Assn.[2] permits a recovery (under the language aforesaid) even in such case; the contrary position has been taken by the

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[1] Preferred Acc. Ins. Co. *v.* Fielding, 35 Col. 19, 83 Pac. 1013, 9 Ann. Cas. 916; Central Acc. Ins. Co. *v.* Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933; Carey *v.* Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055, 5 L. R. A. (N. S.) 926; Caldwell *v.* Iowa Trav. Assn., 156 Ia. 327, 136 N. W. 678; General Acc. Ins. Co. *v.* Homely, 109 Md. 93, 71 Atl. 524.

[2] 156 Mass. 351, 30 N. E. 1013. See also, New Amsterdam Cas. Co. *v.* Shields (C. C. A.), 155 Fed. 54; Hooper *v.* Standard Ins. Co., 166 Mo. App. 209, 148 S. W. 116.

courts of Wisconsin [3] and Minnesota.[4] This conflict is no doubt more apparent than real, the different conclusions arising not out of a divergence in principle, but in the testimony as to the original extent of the disease, and hence as to the effect of the accident. In Manufacurers Accident Co. *v.* Dorgan,[5] where the policy restricted liability to injuries or death effected through external, violent and accidental means alone and independent of all other causes, the deceased was found lying face downward in a stream of water. The court held that if the affection which caused him to fall into the water was only temporary, the company was liable, since the proximate cause of death was accidental drowning. The company is liable, the court adds, unless death would have resulted had there been no water present. In Travelers, etc., Co. *v.* Melick,[6] the deceased accidentally shot himself in the foot and the wound resulted in lockjaw. Later he was found dead under circumstances which indicated suicide which the policy excepted. The court held that the company was liable if the suicide was committed as a result of intense agony from either the gunshot wound or the lockjaw. In several cases, it has been held that although death from hernia or blood poison is specifically excepted in the policy, if the hernia or blood poison results from an accident, the company is liable.[7]

2. Closely akin to the question just discussed is that of whether, where an accident brings on blood poison, there may be a recovery although the policy excepts injuries "resulting from any poison or infection." Here again the great weight of authority sustains a recovery.[8] The courts rely on the familar rule that

[3] Carey *v.* Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055.

[4] White *v.* Standard Life and Acc. Ins. Co., 95 Minn. 77, 103 N. W. 735. Cf. Ludwig *v.* Preferred, etc., Co., 113 Minn. 510, 130 N. W. 5.

[5] (C. C. A.), 58 Fed. 945.

[6] (C. C. A.), 65 Fed. 178.

[7] See Summers *v.* Fidelity Co., 84 Mo. App. 605; U. S., etc., Co. *v.* Harvey, 129 Ill. App. 104.

[8] See Garvey *v.* Phœnix, etc., Assn., 123 App. Div. 106, 108 N. Y. Supp. 186; Central Acc. Ins. Co. *v.* Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933; Simpkins *v.* Hawkeye, 148 Ia. 543, 126 N. W. 192. *Contra,* Kasten *v.* Interstate Cas. Co., 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651.

a policy of insurance, especially where it seeks to limit the liability of the insurer, must be construed against the company whose language it is, and say that the injury does not result from the infection, but the infection from the injury; "otherwise, the policy is a sham." Some of the cases make a distinction based on the time when the poison enters the wound (in case the accident results in a wound), holding that there may only be a recovery if the poison entered the wound simultaneously with the accident.[9] The weight of authority, however, disregards this distinction.[10]

3. The question most discussed in connection with the words first quoted is when the means which effect injury or death are "external, violent and accidental." In considering this question, it should be noted in the first place that the words "external and violent" add little to the word "accidental;" in other words, if an injury is caused by "accidental" means, it follows almost as a matter of course that such means were "external and violent." [11] Hence the question now under discussion substantially resolves itself into, "When is an injury caused by accidental means?" The authorities are numerous on this question, and while the bulk of them are in accord, some are perhaps difficult to reconcile. Many cases adopt substantially the definition of an "accidental" injury given in 1 Cyc. 248-9,[12] to the effect that an accidental injury is one which is not the natural and probable result of an action; an effect which does not ordinarily follow and can not reasonably be anticipated, or which the actor did not intend to produce. Webster defines an accident as an event which takes place without one's foresight or expectation; an unusual effect of a known cause. Applying these definitions, the following have been held to be accidental injuries:

[9] Martin *v.* Manufacturers Acc. Indem. Co., 151 N. Y. 94, 45 N. E. 377; Mardorf *v.* Acc. Ins. Co., L. R. 1 K. B. (1903) 584.

[10] Delaney *v.* Mod. Acc. Club, 121 Ia. 528, 97 N. W. 91; Cent. Acc. Ins. Co. *v.* Rembe, 220 Ill. 151, 77 N. E 123, 5 L. R. A. (N. S.) 933.

[11] See 1 Cyc. 248; 1 Am. & Eng. Enc. L. 2 ed. 294; 3 Joyce, Insurance, § 2864, note; Bryant *v.* Continental Cas. Co. (Tex. Civ. App.), 145 S. W. 636; Pickett *v.* Pac. Mut. L. Ins. Co., 144 Pa. St. 79, 22 Atl. 871.

[12] See also, 1 Words & Phrases, 62; 1 Am. & Eng. Enc. L. 2 ed. 291.

the sting of an insect;[13] bite of dog;[14] toe cut while trimming a corn;[15] finger cut while scuffling with friend by eraser in latter's pocket;[16] meat swallowed gets into windpipe;[17] perforation of body by bone presumably swallowed;[18] woman washing clothes splashes water into eye;[19] hand of sleeping man becomes numb by reason of its position;[20] toe rubbed by new shoe;[21] ear injured in diving.[22] In addition to the above, there are many cases holding disappearances (for instance from shipboard or while hunting) to be accidental; so also with burns, falls and cuts of various kinds, being run over by a train, inhaling gas, taking poison, and being shot or drowned. As to whether a wound received in an altercation is accidental, the authorities differ.[23] There are cases, of which one in Iowa[24] may be cited as typical, which take the position that although a result may be unexpected, if nothing out of the ordinary occurs except the injury itself, such injury is not caused by accidental means. These cases hold that in the *act which precedes the injury*, "there must be something unforeseen, unexpected or unusual" or the injury is not accidental. In the Feder case, a man who had tuberculosis but was thought to be recovering, in undertaking to close a shutter, leaned over a chair and ruptured an artery. The court in holding that this was not an accident, said that there was no evidence that the man fell or slipped or lost his balance,

[13] Omberg *v.* U. S. Mut. Assn., 101 Ky. 303, 40 S. W. 909.

[14] Farner *v.* Mass. Mut. Acc. Assn., 219 Pa. 71, 67 Atl. 927.

[15] Nax *v.* Trav. Ins. Co., 130 Fed. 985.

[16] Delaney *v.* Mod. Acc. Club, 121 Ia. 528, 97 N. W. 91, 63 L. R. A. 603.

[17] American Acc. Co. *v.* Reigart, 94 Ky. 547, 23 S. W. 191.

[18] Jenkins *v.* Hawkeye Comm., etc., Assn., 147 Ia. 113, 124 N. W. 199, 30 L. R. A. (N. S.) 1181.

[19] Sullivan *v.* Mod. Brotherhood of America, 167 Mich. 524, 133 N. W. 486.

[20] Ætna Life Ins. Co. *v.* Fitzgerald, 165 Ind. 317, 75 N. E. 262, 112 Am. St. Rep. 232, 1 L. R. A. (N. S.) 422.

[21] Western Comm. Trav. Assn. *v.* Smith, 85 Fed. 401.

[22] Rodey *v.* Travelers Ins. Co., 3 N. M. 316, 9 Pac. 348.

[23] See Fidelity Co. *v.* Stacey, 143 Fed. 271; Carrol *v.* Fidelity Co., 137 Fed. 1012; Lovelace *v.* Travelers Protective Assn., 126 Mo. 104, 28 S. W. 877.

[24] Feder *v.* Iowa St., etc., Assn., 107 Ia. 538, 78 N. W. 252, 70 Am. St. Rep. 212, 43 L. R. A. 693.

or that he did anything other than what he intended, or that any unexpected thing happened except the rupture; the court denies that every unforeseen and unexpected event is an accident and says that if the result is the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, the injury is not accidental. In pursuance of the same general line of reasoning the following injuries were held not to have been effected through accidental means: In jumping from a train and running, a rupture of the loin is sustained;[25] in swinging an Indian club without any unintended motion, a blood vessel is ruptured;[26] in riding a bicycle, the leg rubs against the abdomen which brings on appendicitis;[27] in pulling on stocking, something drops inside;[28] a man strikes another intentionally and the striker is hurt,[29] in bowling, the side is strained and appendicitis follows;[30] a man raises himself from a chair repeatedly by hands and arms alone and dies of heart dilation;[31] a baseball player slides for a base and is injured[32]—in this last case, although the reasoning of the Feder case seems to be adopted, the jury is permitted to pass on the case. In addition, there are several cases involving over-exertion in various situations where the injuries were held not to be accidental. The doctrine in the cases last cited is based in part upon the idea that a man must be assumed to expect the reasonable and natural consequences of what he does. The courts hold that if a man is sitting perfectly quiet and an artery bursts, it is due to natural causes and is not an accident; this principle is enlarged to apply when a man is voluntarily doing an ordinary thing in an ordinary way and there is nothing out of the ordinary except the injury itself. Some of the cases draw a distinction between accidental injuries and injuries occurring through accidental means, saying that the means may be precisely what the party intended to use, but

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[25] Southard *v.* Railway, etc., Assurance Co., 34 Conn. 574.
[26] 8 Biss. 364.
[27] Appel *v.* Ætna Life Ins. Co., 86 App. Div. 83, 83 N. Y. Supp. 238.
[28] 29 Scot. L. R. 303.
[29] Fidelity Co. *v.* Stacey, 143 Fed. 271.
[30] Lehman *v.* Great Western Acc. Assn., 155 Ia. 737, 133 N. W. 752.
[31] Hastings *v.* Trav. Ins. Co., 190 Fed. 259.
[32] Ludwig *v.* Preferred Acc. Ins. Co., 113 Minn. 510, 130 N. W. 5.

the result (the injury) may be unexpected, and hence accidental. Judge Cooley [33] remarks that the last-mentioned cases are hard to reconcile with the general current of the authorities, and the following may be given as examples of cases in seeming conflict with the Feder (Iowa) case and other authorities in line with it: A blacksmith, after striking a blow, feels pain in his abdomen from which he dies; [34] a blacksmith lifts a heavy bar which causes his heart muscles to dilate; [35] a man stoops to pick up a marble and injures his knee; [36] a doctor injects morphine into his leg and infection develops; [37] a strain causes a rupture of the ligaments or tissues connected with the liver.[38] While there is certainly a seeming lack of harmony among some of the cases on this subject, there is very little real conflict as to what is actually decided. In many of the cases where the injuries were held not accidental, the insured, prior to the injury, was suffering from some disease which the alleged accident, or the over-exertion accompanying it, brought to a sudden consummation. In order for an injury to be accidental, there must be a substantial causal connection between the specific thing done, i. e., the means, and the injury; the question, therefore, is, was the substantial or predominating cause of death the particular thing done (which the plaintiff claims was an accident) and the insured's prior health coupled with conditions voluntarily assumed by him only minor and secondary causes, or, on the contrary, were the latter the real causes of death, and the former a subordinate factor merely.

4. In cases where the insured is alleged to have been killed by an accident, but there are no witnesses thereto (as frequently happens), the plaintiff has a difficult situation to face in the matter of proving death by "external, violent and accidental" means. It has been held that if the deceased stated to his physician the causes which led to his illness, the physician may testify to such

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[33] 4 Cooley, Briefs on Insurance, 3157.
[34] Atlanta Acc. Assn. *v.* Alexander, 104 Ga. 709, 30 S. E. 939.
[35] Horsfall *v.* Pac. Mut. Ins. Co., 32 Wash. 132, 63 L. R. A. 425.
[36] Hamlin *v.* Crown Acc. Ins. Co., L. R. 1 Q. B. (1893) 750.
[37] McFadden *v.* Campbell, 158 N. Y. 723, 53 N. E. 1127.
[38] Patterson *v.* Ocean, etc., Corporation, 25 App. Cas. D. C. 46, 67.

statements.[39] Other cases, however, confine such testimony to statements of the insured's existing pain, symptoms, etc., made to the physician in order to enable him to diagnose and treat the case.[40] Such testimony is admissible either as a part of the *res gestæ*, or because of the inherent probability of its truthfulness by reason of the circumstances under which the declarations are originally made.

Whether a physician who saw a wound may give his opinion as to its having been caused by accidental means is doubtful. In a Virginia case,[41] Dr. Mallet (of the University of Virginia) testified, so far as the opinion shows without objection, as follows: "In my opinion, Newman's death was caused by external, violent and accidental means." This is the only case found, however, in which a witness gave his opinion in the very language of the policy. In Davis *v.* State [42] (a murder case) a physician was allowed to testify as to what kind of an instrument could, in his opinion, have inflicted certain wounds, and a physician who had heard the wounds, and the sink in which the body was found, described, was permitted to say whether the wound could have been, or was likely to have been, inflicted by the deceased accidentally falling into the sink. In Williams *v.* State,[43] a physician was allowed to give his opinion as to the manner or instrument by which an injury had been inflicted. The appearance of an injury and the surrounding circumstances immediately before and after it, coupled with the presumption against an injury being caused by design, either on the part of the deceased or of any other person, have frequently been held sufficient, without direct proof of how the injury occurred, to

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[39] Barber *v.* Merriam, 11 Allen (Mass.) 322; Fort *v.* Brown, 46 Barb. 366; Dabbert *v.* Travelers Ins. Co., 13 Ohio Dec. 792, 4 Bigelow's L. & A. Ins. Rep. 366; Omberg *v.* U. S., etc., Assn., 101 Ky. 303, 40 S. W. 909.

[40] Globe Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563; Ins. Co. *v.* Mosley, 8 Wall. 397; Jenkins *v.* Pac. Co., 131 Cal. 121, 63 Pac. 180; Nat. Masonic Assn. *v.* Shyrock (C. C. A.), 73 Fed. 774.

[41] U. S., etc., Assn. *v.* Newman, 84 Va. 52, 3 S. E. 805. See also Matteson *v.* N. Y., etc., R. Co., 35 N. Y. 487.

[42] 38 Md. 15, 35.

[43] 64 Md. 384, 1 Atl. 887.

take the case to the jury. In Niblach, Accident Insurance,[44] the author says that the fact that an injury was caused by external violence may be directly and positively established by proof of the nature of the injury, the presumption being that an injury is caused by accidental means rather than by design either on the part of the decedent or of any other person. This is illustrated in an Iowa case,[45] where the deceased had a slight wound on his cheek and there was no evidence as to how or when it got there. The court said that while the wound was slight in itself, and while the burden was on the plaintiff to show that it was caused by violent, accidental and external means, the appearance of the wound clearly supported the finding that the cause of the wound was violent and external, and adds, that since there was a presumption that the wound was not intentionally inflicted, and such presumption being available to the plaintiff as affirmative evidence, the plaintiff made out a case to go to the jury.[46] In Western Travelers' Assn. *v.* Holbrook,[47] a man who had been seen sitting upon a balustrade was found dead at the bottom of the stairway. The defendant contended first that there was no evidence that the plaintiff fell, and secondly that if he did fall, there was nothing to show that the fall was accidental since it might have been the result of heart failure, or from an insane or suicidal impulse. The court, while holding that the burden was upon the plaintiff to establish that death was due to external, violent and accidental means, said that the fall must have been either accidental, or suicidal, or the result of the malicious intent of some third party; the opinion then refers to the presumption against suicide, against the commission of a crime and in favor of sanity, and concludes that the case should be passed on by the jury. In a Pennsylvania case,[48] the deceased was seen falling from certain steps at the entrance of his office; afterwards, he was found at the bottom of the steps with a

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[44] Pp. 730-1.

[45] Caldwell *v.* Iowa, etc., Co. (Ia.), 136 N. W. 679.

[46] See a note substantially to the same effect to the interesting case of Preferring Accident Co. *v.* Fielding, 9 Ann. Cas. 917.

[47] 65 Neb. 469, 91 N. W. 276.

[48] Taylor *v.* General Accident Assn., 208 Pa. 439, 57 Atl. 830.

broken arm and otherwise injured; later he died. Physicians testified that there was nothing in the plaintiff's condition before the fall which indicated that he was afflicted with any disease which caused him to fall, nor did his condition afterwards disclose any evidence of disease. The court said that there is no balancing of presumptions between disease and an accidental cause of death, and further that the burden of proof is upon the plaintiff; that the cause of death was an accident may be proved like any other fact, by circumstantial evidence, and the test is whether all the circumstances, viewed as a whole, reasonably exclude by their preponderating probate force any other explanation founded in the evidence. The evidence need not establish a specific one of a number of accidental causes respectively suggested by the evidence; it is sufficient if they fairly exclude or eliminate design or disease as a cause. The court held that while the evidence does not absolutely exclude the possibility of disease or something having caused the fall, it does reasonably exempt both disease and design and makes it more probable that death resulted from an accident. The court adds that the case is not open to the criticism that the accidental cause is an inference based upon a mere presumption, i. e., of the fall, since that fact was proved by direct testimony. Moreover, a fact established by circumstantial evidence is not a mere presumption, but a fact proven by circumstances indicative of it; nor was the plaintiff's case defeated by the fact that the deceased intimated that he did not know how he came to fall. In Western Travelers Assn. *v.* Munson,[49] the deceased was in good health when he left home, but after an accident to the train on which he was a passenger, was taken ill and complained of pains in his back; bruises were found on his body two or three days later and in a few days he died. The plaintiff's theory was that the deceased was injured at the time of the accident. The conductor, however, testified that there was no jar to the train at the time of the accident and that the deceased was asleep both before and thereafter. The court said that proof amounting to demonstration is not required but only a reasonable probability, and permitted the case to go to the jury. In Konrad *v.* Casualty, etc.,

[49] 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068.

Co.[50] the deceased was last seen in a row boat; the boat was found empty and the body floating in the water fifteen days thereafter. The court, in permitting the case to be passed on by the jury, said that death must have been caused either by natural causes, or by the deceased himself, or by violent and external means; the presumption against suicide is referred to and the court adds that the good health of the assured and the circumstances preceding his death do not indicate that death resulted from natural causes. In Wilkinson *v.* Aetna, etc., Co.,[51] the defendant contended that while there is a presumption against intentional injuries, such presumption has no probative force and since the burden of proof was on the plaintiff, the case should have been withdrawn from the jury. The court held, however, that the circumstantial evidence, aided by the above presumption, made out a prima facie case for the plaintiff. In McCormick *v.* Illinois, etc., Assn.,[52] the deceased fell from his buggy and the court ruled that there were two theories, either of which the jury might adopt: one that the defendant's fall was caused by an accidental jolt or jerk of the buggy, and the other that the deceased was taken ill and fell as a result. The opinion adds that the real question is, "Was the death the result of the fall, or was the fall the result of death?" It was the province of the jury to determine between these conflicting theories. In Travelers Insurance Co. *v.* Sheppard,[53] the insured disappeared while hunting. The court said that proof of death must necessarily be circumstantial since no one was with the assured at the time of death; although the whole of plaintiff's evidence was circumstantial, and although the facts directly in issue were established only inferentially, such evidence was sufficient to go to the jury as to death having been caused by external, violent and accidental means. There are several cases of disappearance from shipboard where similar rulings were made.[54] There are a number of interesting cases where the

[50] 49 La. Ann. 636, 21 South. 721.

[51] 240 Ill. 205, 88 N. E. 550. [52] (C. C. A.), 159 Fed. 114.

[53] 85 Ga. 751, 12 S. E. 18. And see Preferred Accident Co. *v.* Barker (C. C. A.), 93 Fed. 158.

[54] Owners of Swansea *v.* Rice, L. R. 238 (1912) A. C., 24 Ann. Cas. 899; Travelers Co. *v.* Rasch, 23 Ohio Cir. Ct. 491.

plaintiff relied upon circumstantial evidence but such evidence was held insufficient to permit the jury to pass on the case. These decisions are for the most part based on the fact that the insured was suffering from the disease from which he finally died prior to the accident, or on the proposition that where either an accident or some other cause, equally probably, results in death, there is no presumption as to the cause, and the plaintiff fails; the presumption against the intentional infliction of injuries, either by the deceased or anyone else, does not carry the further presumption that death was accidental, since it might have been due to disease or natural causes.[55]

The conclusion is, therefore, that in cases where the nature of the injury, or the circumstances surrounding it, indicate reasonably clearly that such injury was caused either intentionally or accidentally, the presumption against intentional injuries comes to the plaintiff's aid and he is entitled to have his case passed on by the jury. On the other hand, if the nature of the injury and the circumstances surrounding it do not reasonably eliminate disease or natural causes as the means of such injury, then the plaintiff fails, unless by expert or other evidence he at least negatives the existence of disease or natural causes, or their causal connection with the injury.

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[55] Keefer *v.* Life Ins. Co., 201 Pa. 448, 51 Atl. 366, 88 Am. St. Rep. 822; Laessig *v.* Travelers, etc., Assn., 169 Mo. 272, 69 S. W. 469; Merritt *v.* Preferred, etc., Co., 98 Mich. 338, 57 N. W. 169; Carnes *v.* Iowa, etc., Assn., 106 Ia. 281, 76 N. W. 683; Nat. Assn. *v.* Scott (C. C. A.), 155 Fed. 92; Globe *v.* Geresch, 163 Ill. 625, 45 N. E. 563.